THE DEVELOPMENT OF THE ENGLISH LAW
UNDER HENRY II

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By

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Bachelor of Science

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Stillwater, Oklahoma

1951

Submitted to the faculty of the Graduate School of
the Oklahoma Agricultural and Mechanical College
in partial fulfillment of the requirements
for the degree of
MASTER OF ARTS
May, 1953

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PREFACE

The writer wishes to express his appreciation to the staff of the History Department of Oklahoma Agricultural and Mechanical College for their helpful advice and criticisms and especially to Dr. Alfred Levin, under whose supervision the experimental work was carried out. Dr. Levin has been a constant source of encouragement and guidance and has been most helpful in furnishing invaluable constructive suggestions in the writing of this thesis. The writer further wishes to thank Dr. O. A. Hilton and Dr. Lewis, who were most helpful in their valuable suggestions on how to better perform the writer's task.

Moreover, the writer wishes to thank the staff of the Oklahoma Agricultural and Mechanical College library, who did much to aid the writer in his efforts to cull all of the available sources and also to obtain needed materials from other libraries, when such material was not available at hand.

TABLE OF CONTENTS

CHAPTER I

INTRODUCTION

Henry II left his indelible mark on English history, for he laid the firm foundations of a legal system that still exists today within the framework of the English courts.[1] Moved by the fact that crime, unchecked by royal authority, might create disorders, and moved by his desire to derive as much profit and revenue from the work of his courts as possible, Henry II expanded the judicial system of the realm over that of the church and feudal courts in an effort to subdue these last vestiges of feudal confusion and strife.[2]

To guide the establishment of a strong legal system, Henry II was possessed of a genuine hatred of crime and tyranny and was equipped with a good, intelligent, creative and balanced mind. A tireless energy keynoted his whole character in his efforts to establish a strong monarchy through the establishment of a strong judiciary, and he left no stone unturned in his efforts to create such a judiciary.

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[1]William Stubbs, Historical Introduction to the Rolls Series, Compiled and Edited by Arthur Hassall (London: Longmans, Green and Company, 1902), 89.

[2]George Osborn Sayles, The Medieval Foundations of England (London: Methuen, 1950), 325-6.

Yet on the other hand, Henry II was a man with definite moral and physical weaknesses that were to hamper his work at various periods throughout his fruitful reign.[3]

For the first decade of his reign, Henry was primarily concerned with the problem of restoring peace to England, which he felt to be in a state of anarchy upon his ascension to the throne. His predecessor, Stephen, had begun his reign in 1135 by immediately creating opposition to his royal authority when he allowed the new Earls to build castles, which could serve as good points of defense against him in case of a feudal uprising by his barons. And he revealed that he was unable to put down such revolts, when a rift developed between himself and his barons. The result was a fourteen-year civil war with Matilda, the daughter of the deceased Henry I. The years following this war were marked by a bewildering series of raids, sieges and ravaging of towns, with the balance of power swaying from one side to another. At length, Matilda lost ground and retired to Anjou to give up the struggle. Her retirement did not bring peace to England, for Henry II, her son, now appeared upon the scene to fight for the throne, and the barons, in their own interests, were determined to continue the carnival of misrule; every lord of a castle was a petty king, ruling his

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[3]John Capgrave, Liber de Illustribus Henricus, Edited by Reverend Charles Hingeston (London: Longman and Company, 1858, Rolls Series, No. 7), 82-3.

own tenants, coining his own money, administering his own justice. It was with this situation that Henry II was to concern himself when he ascended to the throne upon the death of Stephen in 1154.[4]

Henry's purpose was to bring back as nearly as possible the sound government provided by his grandfather. For during the time of Henry I, England had seen royal power extended over the local districts, complaints of the people heard by officials who were called Itinerant Justices on matters of property and taxation, class feeling was less marked, and the common people were contented with their lot in life.[5]

To carry out his purpose, Henry II embarked upon a program of improving the position of the royal government. This he did by disbanding the large contingents of mercenaries that Stephen had brought into England in 1135, thus lessening the animosity of the barons to any possible changes. Furthermore, Henry issues decrees and commands that the royal demesne lands and privileges so recklessly granted away by Stephen be restored to the jurisdiction and possession of the king. He moved to suppress the local justiciars, resident officials who stood in the way of his

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[4]Arthur Cross, A Short History of England and Greater Britain (New York: The Macmillan Company, 1939), 66-9.

[5]Ibid., 66.

proposed judicial reform. By decreasing their authority to collect and levy taxes, he could use his own self-appointed and supervised royal officials for taxation purposes and insure that the money that had formerly gone into the pockets of private individuals would accumulate in his own hands.[6]

The task of preserving order in England was in the main the task of repressing and punishing crimes of violence. Murder and assault, robbery and burglary filled the earliest criminal court records, and on the civil side, a large proportion of the cases concerned attacks on property not very different in character. Henry's basic problem was to so perfect the judicial machinery and procedure as to protect peaceable citizens from bodily harm and property from violent entry and from unlawful seizure by greedy barons intent on adding to their vast holdings.[7] The task that Henry set out to perform might have appalled an experienced legislator, much less a young man of twenty-one. He did not inherit a band of veteran counsellors; the men with whom he had to work were the survivors of the Norman nobility that had caused the present anarchy.[8] It would appear that upon

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[6]W. E. Lunt, History of England (New York: Harper and Brothers, 1945), 108-10.

[7]George Burton Adams, Constitutional History of England (New York: Henry Holt and Company, 1934), 320.

[8]William Stubbs, Constitutional History of England (Oxford: Clarendon Press, 1875), 446-7.

his young shoulders alone lay the burden of bringing England out of her state of dissolution; his advantage lay in the absolute exhaustion of all the forces which had produced that state of anarchy in England.[9] The fact that he had unsurpassed physical strength and vitality enabled him to withstand the strong opposition of the barons and the Church when they threatened to overthrow all of the legal reforms that he attempted to put into practice. His determination not to lose his throne as Stephen had lost it when Henry II himself had overwhelmed him with a mass of force, aided greatly by corrupt and decadent government, no doubt set his strong and wise mind to work in expanding the royal authority at the expense of local authority. With a strong monarchy and a uniform justice to expand the king's authority at the expense of the diverse justice of the feudal lords, it would be difficult for the seeds of rebellion to grow within the kingdom.[10] Therein lies his primary reason for the creation of law and order, and not out of any sympathy for the needs of his people. His objectives were to consolidate his power, strengthen the royal administration, and thus replace the loose rule of his day by a centralized monarchy, under a strong monarch, such as himself.[11]

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[9]Stubbs, op. cit., 446-7.

[10]George Osborn Sayles, The Medieval Foundations of England (London: Methuen, 1950), 327-30.

[11]Stubbs, op. cit., 447.

Doubtless, Henry was also prompted to build a new England because of the revenue that he could obtain from diverting local justice into his royal courts. Since a fee had to be paid to the king every time a writ was obtained to get a hearing in a royal court, the king thus could acquire the money that he required to run the government. Consequently, he could and did take away much of the dependence of the monarch upon the nobles of the realm for his financial needs. It would seem then that the fees and fines that would pour into the royal coffers were significant incentives behind Henry's desire to create a royal justice.[12]

Having early familiarized himself with the existing English law, Henry II ranks as an outstanding legal authority. His knowledge of the law was very extensive, and he adherred to the ancient custom of sitting in judgment in his own person, even after he instituted the legal circuits with their justices of assize able to decide cases remote from the King. His legal knowledge was not merely general, for he was accustomed to settle questions of disputed charters, where forgery was suspected, and dubious cases of law were referred often to his acute judgment.[13]

In the early days of Henry's reign, most law was administered in local courts, the Shire and Hundred Moots, and

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[12]Sayles, op. cit., 326.

[13]John Harvey, The Plantagenets (London: B. T. Batsford Ltd., 1948), 14-15.

since the coming of feudalism, in the Lord's manorial courts. The King's own court was nothing but a court for the protection of royal rights against the encroachments of feudal law and feudal practices.[14] Originally the ancient courts of the hundred and shires had met in assembly once a month to collect taxes and to have all judicial cases heard, both criminal and civil, by the reeve or elder. Gradually these two courts had been brought under control of the king, exercising his control through court officials such as the shire reeve or sheriff in the shire courts and through the reeve or elder in the smaller districts.[15]

Another of the distinct court systems was that of the ancient franchises, obtained from various kings down through the centuries since the Conquest or by force of arms and deception from those who had exercised the royally-granted right to act as a court of law within their particular areas. The third which was that of the strictly feudal courts of the manor, had been organized by the nobility who had assisted William in his conquest of England, and had grown during the time of anarchy and absence of strong kings to prevent their rapid growth of local power over legal matters.

The joint existence of these systems was a source of perplexity, for not only were their proper provinces and

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[14]Sir Henry Slesser, The Middle Ages in the West (London: Hutchinson and Company, 1949), 116.

[15]Cross, op. cit., 46.

matters of litigation as yet vaguely divided, but their very existence afforded a basis for aggression, and for oppression and exaction. The fact that the several jurisdictions were often supervised by the same person added an element of uncertainty in the attainment of justice and a temptation to indiscriminate tyranny. The only solution lay in limiting the exercise of the old franchises, hindering extension of new courts and regulating the whole by the appointment of superior judges and competent sheriffs, who would maintain royal control over the jurisdiction of the private courts.[16]

Henry's attempt to institute legal reforms also brought him into conflict with the Church, which maintained its own private courts beyond the jurisdiction and control of the royal arm. The cleric in orders who committed a crime could be tried in the church courts only, and punishments were wholly inadequate according to Henry's viewpoint. Often a cleric who had committed a murder was let off with no more than losing his privileges or even getting no more than a severe chastizement. Then too, there were many lay people who held a sketchy claim to the rights of a cleric and who could not be prosecuted by the king and his courts. Henry was determined to bring about a legal system that would bring the Church courts under his control and correct abuses by those within the bosom of the Church. In that

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[16]Stubbs, op. cit., 123-4.

determination, Henry was to be opposed by Thomas Becket, Archbishop of Canterbury, who managed to keep Henry from taking over complete control of the church courts.[17]

The legal instrument that Henry II used most in his work of reform was the royal prerogative. In Anglo-Saxon times, the royal prerogative had included the right to fines for breaches of the peace when persons under the king's protection had been injured, jurisdiction over persons of high rank, compensation for life and the position of commander of the national army.

However, with the Norman Conquest, the power of the king over his subjects became a part of the personal rights of the king. William the Conqueror demanded a direct oath of allegiance to the king above a vassal's own respective lord, and he ruled with a despotic and harsh hand in building the royal prerogative to unheard of heights in the minds of his unwilling barons. Upon his death, the power had somewhat disintegrated and by the time of Stephen, the king had become somewhat of a figurehead, controlled by those parties responsible for his election to the throne.[18] It now became Henry II's purpose to restore the power of the king, in order to show that there were powers in his office far older

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[17]George Burton Adams, Constitutional History of England (New York: Henry Holt and Company, 1934), 95-7.

[18]Thomas Pitt Taswell-Langmead, English Constitutional History (Boston: Houghton Mifflin Company, 1946), 19-63.

than feudalism which freed him from the shackles of the existing feudal law and court system.[19]

By increasing his right to exercise a royal prerogative through the use of writs which drew both cases and money into his courts and by orders in council which had the force of law, Henry II increased the royal power at the expense of his nobles. While they objected to his encroachment upon their feudal rights of controlling law and order, they were unable to resist the rapid increase of business in the king's courts. Henry II seized upon powers which had been timidly used by his predecessors to become one of the most powerful kings that England has ever known, and in so doing perfected its legal system. With all his regard for law and order, he never lost sight of the end to be attained, striking at his opposition in the persons of the nobility and the Church whenever he deemed it necessary or expedient, and using all of his legal knowledge to build a uniform system of law and order with a Common Law of precedent and custom welded into one to guide the decisions of his judges.[20]

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[19] Adams, op. cit., 257-8.

[20] W. E. Hunt, History of England (New York: Harper and Brothers, 1945), 407-8.

CHAPTER II

HENRY II ATTEMPTS TO SUBDUE CHURCH COURTS

In his struggle with the Church, Henry II faced a formidable foe, one capable of forcing him to back down on many issues, and one that was firmly entrenched within the English nation. While he realized that he must curtail the legal jurisdiction of the church, he realized that this involved a struggle to lessen the influence of Church courts. Ever since the fifth century, spiritual courts had dealt with spiritual persons, as for a long time each race, even the Jews, had been judged by its own laws. Since that time, where one of the parties to a suit was a cleric, the case would be tried by the Bishop, his deputy, or often the Archdeacon. The law applied to the case was always to be Canon Law, and by Henry's time, it had been highly systematized and was a universal scientific code.[1]

William the Conqueror enhanced the position of the Church in its role of administering separate justice by severing the ecclesiastical courts from the civil courts, giving the Church a free and independent hand to try and punish its own. While he managed to control them, his successors

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[1]Sir Henry Slesser, The Middle Ages in The West (London: Hutchinson and Company, Ltd., 1949), 117.

were unable to cope with a mass of Canon Law that grew up after 1066. Stephen's Charter granted the Church full liberty enabling it to carry its pretensions to a high level. Small wonder it was that Henry II faced an almost impossible task; that of limiting the jurisdiction[2] of the Church courts in order to institute his reforms. Particularly disturbing to Henry II was the circumstance that enabled these ecclesiastical courts to flaunt royal justice by allowing clerics to escape with only slight punishments for what he considered major crimes.[3] The Church law alone in this connection threatened to stand out against the legal innovations that he proposed to institute, and it explains in part, Henry's insistence on bringing the Church within the ambit of his royal schemes.[4] Henry II wanted a closer centralization of the court system, and to have such a unity of law required him to invade what had been considered as basic rights and privileges of Church courts to control its own clergy and clerks thereof.[5] Henry would have only one kind of justice.

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[2]Sir James H. Ramsey, The Angevin Empire (New York: The MacMillan Company, 1903), 39.

[3]W. E. Lunt, History of England (New York: Harper and Brothers, 1945), 109-10.

[4]Slesser, op. cit., 117.

[5]George Burton Adams, Constitutional History of England (New York: Henry Holt and Company, 1934), 278.

As the royal courts assumed more and more power, and as the state assumed more and more the conditions of settled order under the new king, the inequities of justice which resulted from the separate position of the clergy began to attract even more attention than it had at the outset of his reign.[6] He became increasingly aware of cases in which persons in the guise of clerics had been shown to be guilty of murder, but who were let off with no worse than imprisonment in a monastery, degradation from a clerical office, or with a flogging and fasting.[7] Such laxness was disturbing to Henry who was a stern judge of crime and a strict believer in making the punishment fit the crime. One special case finally brought the conflict out into the open, and before it was over, the Church was to have found its jurisdiction greatly curtailed over those who wore the frock of a cleric.

The Canon of Bedford, Phillip of Broi, when accused of a murder, had managed to clear himself by merely taking an oath in the local bishop's court. Afterward the king's justice in Bedford summoned him to appear in his court and answer to the same charge. He refused with such insulting language that the justice at once reported the incident to Henry II who called it a contempt of royal authority. Henry

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[6] Ibid., 279.

[7] David H. Montgomery, The Leading Facts of English History (Boston: Ginn and Company, Publishers, 1897), 397-8.

in great anger demanded that the Canon answer for it in his court. The Archbishop of Canterbury refused to recognize royal jurisdiction and held that if the king complained of any injury, then let him come or send someone to Canterbury, and there he should have full justice by ecclesiastical authority. This declaration clearly stated the position of the Church on the separation of the courts, according to Canterbury's interpretation. Even the king could not obtain justice for a personal injury, nor could he have the case re-opened to permit a stricter and more inclusive penalty. So long as this was possible, there could be no effective centralization and no supremacy of the national law within his realm.[8]

Thus, confronted with cases involving clerks whom he wanted tried in his courts, and in order to take away the privileges held by the Church and thereby strengthen the legal system by means of a single court system, he called the bishops to Westminster on October 1, 1163, and complained of corrupt practices in the Church courts. He then demanded their preliminary assent to an ordinance for the trial of clerks charged with criminal offenses.[9] To these bishops he proposed that which to be thereafter included in the Constitutions of Clarendon, namely:

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[8]Adams, op. cit., 280.

[9]Ramsey, op. cit., 41-42.

(1) that all clerks accused of any crime were to be summoned in the first instance before the king's justices, who should determine whether the cause ought to be tried in the secular or spiritual court. (2) Laymen should be tried in the bishop's courts only if accused by lawful and specific accusers and witnesses. (3) The custody of vacant archbishoprics, bishoprics, abbeys and priories of the royal demesne should be in the king's hand, and their revenues paid to him. Other articles involved pleas of debt, suits between laymen and clerks as to land and the like.[10]

Determined to curb what he viewed as a disregard of justice in Church courts, Henry II called for a general Council to meet at Clarendon in January, 1164.[11] Here he re-stated the ordinance that he had first proclaimed at Westminster and enlarged upon it. Henry felt that an evil deed should be punished with severity, without regard to class, and that it was inconsistent to allow the clerics to remain free from the jurisdiction of his courts. He decreed at Clarendon that when clerics were found guilty, in the presence of the king's justices, they were to be discharged from office, and to be brought before the king's court to be punished.[12] Further, suits to determine the right of presentation to a living even between two clerks must be tried in the king's court, as well as suits to determine whether a

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[10]Adams, op. cit., 281.

[11]Thomas Pitt Taswell-Langmead, English Constitutional History (Boston: Houghton Mifflin Company, 1946), 67-9.

[12]Matthew of Paris, Chronica Majora, Vol. II of 7 Vols., Edited by Henry Richards Luard (London: Longman and Company, 1872, Rolls Series, No. 57), 227.

given fee was held in free alms, that is, free from taxation as a result of a gift to the Church, or as a lay fee held more directly of the King's wishes.[13] Henry demanded that in future the state or civil courts should be supreme, and that in every instance his justices would decide whether a criminal should be tried by the common law of the land or whether they were to be handed over to the church courts.[14]

The Constitutions of Clarendon were thus put into force by Henry II as part of his scheme to stop the differences in legal standards that had arisen from divided authority. Little did he realize that he was establishing the Curia Regis as a tribunal of regular resort, the first regular and systematic use of twelve men for criminal causes, and the use of these same twelve men for recognition of claims to land.[15] With the Constitutions, the legal reforms that he gave to the modern world were well under way.

All of the bishops assembled at Clarendon gave their immediate assent to the Constitutions, but Thomas Becket, Archbishop of Canterbury and not present at the Council, refused to give his support to what he felt were dictatorial terms and wholly without any legal foundation. He agreed at length only by stating, "If my lord the King will have me to

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[13]Adams, op. cit., 283.

[14]Montgomery, op. cit., 91.

[15]William Stubbs, Constitutional History of England, Vol. I of 2 Vols., (Oxford: Clarendon Press, 1875), 465-6.

perjure myself so be it; I must hope to do penance in the future." It was evident that he had given in only for the moment, for soon after he retracted his oath and refused to be bound by the Constitutions.[16]

Thereafter, Becket systematically resisted the attempts of Henry to bring guilty clerks to trial in civil courts. Finally, Henry decided to use a test case to force his hand. John Marshall, a leading magnate, brought an action in a church court to recover some land. Henry cited Becket to answer in court for his failure to give justice. The Archbishop did not attend, but sent his attorneys who asserted that no wrong had been done. Henry regarded this as a breach of the twelfth article of the Constitutions regarding contempt of court that all clergy were to answer for their baronies to the king's justices and officers, and follow and observe all royal rights and customs, and so on.[17] Enraged at Thomas, Henry called a council at Northampton to try him on charges of treasonable actions against the king.[18] Becket was fined a large sum in absentia, and his bishops urged him to accept the decision handed down by the council of his peers. Canterbury refused to acknowledge its

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[16]Sir James H. Ramsey, The Angevin Empire (New York: The Macmillan Company, 1903), 48-50.

[17]Ramsey, op. cit., 54-58.

[18]Matthew of Westminster, Flores Historiarum, Vol. I of 2 Vols., Edited by Henry Richards Luard (London: Eyre and Spottiswoode, 1890, Rolls Series, No. 95), 78.

jurisdiction, and realizing that his life was in immediate danger, he fled from England to the protection of the neighboring king of France, where he remained for some six years.[19] It was evident from the fact that Thomas Becket had flaunted his royal power that Henry II would not be able to force the Church into a position of complete submission.[20]

The next few years were spent in negotiations between the Pope and Henry in order to allow the return of Becket to England. Henry II would not compromise until Becket agreed to accept the conditions of the Constitutions freely and without reservations of any kind. Finally, Pope Alexander threatened Henry with an Interdict that would cut off England from the services and ministering of the priests and monks. Such a situation might result in a popular uprising, and Henry finally agreed to the return of Becket to England and the resumption of his office as Archbishop of Canterbury.[21] Becket returned to England to pick up the quarrel once again; the negotiations with the Pope for his return, had resulted in the yielding of Henry II without any real settlement being concluded between the Archbishop and Henry regarding the Constitutions of Clarendon. Becket returned to England in 1170 with the situation still much the same as it

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[19]Adams, op. cit., 285-90.

[20]Ramsey, op. cit., 58-62.

[21]Sir Henry Slesser, The Middle Ages in the West (London: Hutchinson and Company, Ltd., 1949), 118.

had been six years before; one fighting to keep the Church supreme, the other trying to fight the battle of lay rights.

Becket immediately began to excommunicate all bishops who had been consecrated during his absence, or who had participated in the recent coronation of Henry's son as heir apparent to the English throne. He particularly directed his wrath at the Archbishop of York who had presided at the coronation and proceeded to excommunicate this prelate of the Church and suspended him from the duties of his office. Appeals to Becket by the Archbishop and by the King were met with a stubborn refusal to allow York to resume his duties. The result was Henry's angry denunciation of Becket, asking his assembled Court if there were anyone in his presence who would avenge the insults of the Archbishop to the King. Several of his well-meaning friends took it as a command to slay Becket, and finding him in his church, killed him before the altar.[22]

The martyrdom of Becket raised a clamor that threatened to undo all that Henry was attempting to put into the law of the English nation. The Church bitterly assailed him, and one esteemed Churchman called him an oppressor of the Church, and hailed Becket as a resister of Henry's oppressive laws, for which he was brutally murdered before the altars of the Church.[23]

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[22]Ramsey, op. cit., 125-136.

[23]Walter of Coventry, The Historical Collections of Walter of Coventry, Vol. I of 2 Vols., Edited by William Stubbs (London: Longman and Company, 1872, Rolls Series, No. 58), 17.

Henry ultimately was forced to assume the position of a humble penitent by the aroused indignation of the Church and of his subjects. He hastened to do penance and purging himself of any guilt in the murder of Thomas, he was reconciled to the Church.[24] The conditions of reconciliation were so severe that it seemed for the moment, Henry II would be forced to cease his attempts to institute an uniform law for England. The Church demanded that he renounce any customs which had been introduced against the Church in his time, including the provisions of the Constitutions of Clarendon on the trials of criminous clerks by secular courts.[25] He was forced to yield jurisdiction on disputes involving marriages, sacrileges, elections to bishoprics and the like. These cases were to come before the Pope as the ultimate interpreter of Canon Law. It would appear that Canon Law had triumphed over the pretension of the Common Law.

No doubt, Henry felt that he had completely failed in his efforts to establish a legal system, closely controlled and guarded by royal power. Yet he had, in fact, won a great victory over the Church. While it is true that Canon Law was permitted to operate and while those clerks accused of serious offenses were still tried and punished by the

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[24]George Burton Adams, Constitutional History of England (New York: Henry Holt and Company, 1934), 298-300.

[25]Ibid., 300.

Church courts, it is also true that in all minor offenses, there was no distinction between clerks and laymen. In civil cases, also, suits which involved the right of property, even the right of presentation of livings, the state courts still had general jurisdiction.[26] And although Henry had been forced to mollify the severity of the Constitutions of Clarendon, by which he had hoped to establish the predominance of a royal justice, the attempt was not completely a failure; like seed buried in the soil, it was to spring up anew and bear good fruit in later years.[27]

Gradually Henry found that he was able to force the Church to accept the legal ordinances that he instituted, especially after the influence of the Pope waned as a result of conflicts over rightful successors to the Bishop of Rome.[28] On July 15, 1175, Cardinal Hugo Pretoleonis came as the new Papal Legate to England and presented Henry II with the authority to try clerics not belonging to the priesthood before secular courts, a real concession by the Church to the jurisdiction of Henry's law. No doubt, the fact that Henry's recovering from the blow to his legal system was threatening to cut off the revenue flowing into the Papal coffers wrung

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[26]Adams, op. cit., 300-01.

[27]David H. Montgomery, The Leading Facts of English History (Boston: Ginn and Company, Publishers, 1897), 93-4.

[28]Ramsey, op. cit., 125-136.

this concession from the Church.[29] A brief glance of records will show that the Church continued to make very definite concessions after 1172 to the claims of the lay power to try clerics. While the Church as a spiritual power continued to thrive and develop, Hubert of Bosham observed that many of the condemned clauses of the Constitutions of Clarendon were in effect.[30] Henry II might practice penance when it looked as if his throne were to fall, but with the danger removed with the invasion of France, the principal instigator in the attempt to overthrow him, he could do much as he pleased. The Pope might threaten, but with no forces to back him up, his words would have little effect. Furthermore, Henry II had managed to set the affairs of the nation in fairly well-organized order by the 1170's, and the power of the barons had been decreased by his royal justice, which enabled one to transfer his cases into royal courts for cheaper, more efficient justice. The Church soon found itself in the position of the barons, when it found its jurisdiction being superseded by such documents as the Assize of Clarendon, Assize of Northampton and others. And with Church opposition gradually becoming confined to points of morals,

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[29]Matthew of Paris, Historia Anglorum, Historia Minor, Vol. II of 3 Vols., Edited by Sir Frederic Madden, (London: Longmans, Green, Reader and Dyer, 1866, Rolls Series, No. 44), 392.

[30]Mary Cheney, "Spread of Canon Law in England," English Historical Review, LVI (April, 1941), 188-97.

Henry II could better occupy his time with increasing the royal justice throughout England.

CHAPTER III

DECLINE OF LOCAL PRIVATE COURTS

With the partial surrender of the Church to the royal courts, Henry II was free to complete his work of legal reform by next attacking the power of the local courts of the sheriffs, barons, and other feudal lords. These individuals functioned as justices in their own private courts and resisted the encroachment of royal justice upon their franchises successfully through the reign of the early Norman kings. They were to find in Henry II, a foe who was able to subordinate their power to his own.

One of the first acts of Henry's reign was to institute a campaign of breaking down baronial opposition to his central authority. He began by pulling down the unlicensed castles, built by the so-called robber barons, the nobles and descendents of William who had either seized or been given the estates of the former English landlords.[1] Next he instituted a form of taxation that weakened the hold of the barons on the king. By means of the "scutage", a war-tax whereby the nobles escaped military service by paying a stipulated sum of money in order that the king could hire

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[1]David H. Montgomery, The Leading Facts of English History (Boston: Ginn and Company, Publishers, 1897), 396-7.

mercenaries, Henry was able to build up a central army subject only to his command. In that way, he minimized the necessity of calling upon the barons for military assistance, or to vote funds with which to carry on military campaigns.[2]

However in gaining military control over the barons, Henry II had won only half of his battle; to cement his power over the nobles, the king must and did obtain control of justice.[3] When Henry II came to the throne, large portions of what would normally be districts under the jurisdiction of his royal courts had passed into the hands of feudal lords, barons and sheriffs as their own private jurisdictions. Kingship had weakened to the point where it was little more than a symbol due to the part played by the feudal aristocracy in helping a king to hold his throne, the enforcement of criminal law, formerly a royal responsibility, passed into private hands. Measured by the number of cases to be tried, most of the enforcement of civil law in regard to the large property interest of the time (land was also a private matter) was the prerogative of the feudal administrators of justice.[4]

Local justice was rarely royal; it was popular in the sense that it appealed to the feudal nobility who benefited

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[2]J. R. Green, A Short History of the English People (New York: Bigelow, Brown and Company, Incorporated, 1892), 208.

[3]Montgomery, op. cit., 397.

[4]George Osborne Sayles, The Medieval Foundations of England (London: Methuen, 1950), 332-3.

by it, and it was definitely feudal in nature. There was in Henry's opinion no reason why the king's court should restrict itself to protecting royal interests and resolving the differences of his immediate tenants. It was the king's duty to ensure peace in the land, and he could not perform his duty unless he assured equal justice for all. Just as with the Church courts, it was a case once again of asserting the royal influence over the private influence. Using his prerogative to intervene when he deemed it necessary, he established the use of prerogative writs, in ever-increasing numbers, as part of the king's inherent right to issue orders binding upon the English people, until they came to provide the motive force of nearly all the machinery of the law. These writs were brief letters of instruction, sent out by Henry and then by his chancery clerks, to make sure that proper justice was done by those responsible for it, with the proviso that disobedience would be construed as contempt of the king. Disregard of the king's justice would call for the local courts to answer for their contempt before his justices. The king made it clear that he would exercise ultimate control through the use of the writs, and that anyone could and would be protected by his courts.[5]

Two instruments, in particular, which lessened the power of baronial courts and transferred many cases out of their

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[5]Sayles, op. cit., 333-342.

jurisdiction were the writs of Right and Praecipe, both concerning only ownership of land and not possession. The writ of Right directed that the questions of right, of title, of ownership, and the like, should be tried. It was addressed to the lord of the court commanding him to do justice to the plaintiff who had obtained the writ and implying that the lord was unwilling to do so. It asserted that if the lord did not give proper justice, some other person, possibly the sheriff or a royal commissioner would try the case. Legally the writ rested on the appeal of defect or default of justice in the lord's court, and gave the vassal the right to carry his case into the court of his higher lord, namely the king's court, if his lord refused to guarantee justice. The king thus made it easier to obtain justice by transferring the case out of the baronial courts, thereby reducing the legal traffic that would pass through these courts.[6]

The writ of Praecipe went further in undermining the feudal courts by ignoring them altogether. This writ, obtained by the plaintiff was addressed to the sheriff and directed him to command (praecipe) the defendant to return land in dispute to the plaintiff or else appear in the king's court and explain why he had not done so. It assumed that the plaintiff's case was just, and it was based on the duty of the king to secure justice for all. As a means of

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[6]George Burton Adams, Constitutional History of England (New York: Henry Holt and Company, 1934), 107-8.

restricting local courts, this writ passed over feudal law and affected the whole legal structure by strengthening the King's Court.[7] By sending the writ to the sheriff, a royal official, Henry II took the complaint of the tenant out of the local courts into his own, with the sheriff acting as a royal judge in many cases.[8]

The normal method of trial under the two assizes of Right and Praecipe was usually that of trial by battle; two champions, one for the plaintiff, and one for the defendant, would engage in combat with the decision to go to the victor of this battle. At some undetermined date, Henry issued the Grand Assize, which ordered that when the demandant presented his claim in the lord's court and offered battle, the tenant in possession could, if he chose, decline battle and have the action removed to the King's Court, and the whole question of title determined by lawful knights of the shire acting as a jury after hearing the testimony. The tenant thus "put himself on the Grand Assize" and escaped the manorial jurisdiction altogether.[9] It can readily be seen that such a writ did much to weaken further the judicial armor of the manorial courts. With many more cases withdrawn from local courts

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[7] Ibid., 108.

[8] A. T. Carter, A History of the English Courts (London: Butterworth and Company, Ltd., 1935), 26-7.

[9] Carter, op. cit., 29.

as a result, it was becoming more and more apparent that the influence of these courts would soon die out almost completely.

It soon became apparent to Henry II that all of the writs of ownership that he had initated were incapable of covering all forms of legal action, so he shortly established the petty or possessory writs as a more summary method of procedure than the writs of Right, Praecipe, and Grand Assize.[10] The possessory assizes, three in number, were Novel Disseisin, Mort D'Ancestor and Darrein Presentment. These three writs did not submit to the jury the question of rightful ownership as in the case of the earlier writs, but merely whether the plaintiff had not been wrongfully dispossessed; in the first two cases, regarding land, in the third, in connection with the right of ownership to a church estate.[11]

Under the writ of Novel Disseisin, a jury of twelve "legales homines" of the neighborhood were summoned to answer a plain question of fact. If B thought that A had no right to possession of an area of land, he had to bring an action to turn A out of the land. By this ordinance, "possession" as opposed to "ownership" was given a rapid remedy,

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[10]Dudley Julius Medley, English Constitutional History (Oxford: B. H. Blackwell, 1913), 383-85.

[11]Adams, op. cit., 106.

and the seisin (possession) of a free tenement was protected by the king, no matter of what lord it might be held.[12]

According to the writ of Mort D'Ancestor, if A died holding possession of a tenement, not as a mere life tenant, but with the right to transmit the title to his heir, that heir would be entitled to be put into possession as against every man, irrespective of the validity of his ancestor's title. The effect of such a writ was to ensure proper title to land owner by a tenant when a lord might attempt to force his heirs to turn the land over to him on the grounds that no hereditary claim to the land existed. This assize was restricted to sons, daughters, brothers, sisters, nephews or nieces of the ancestor.[13]

The third possessory writ, that of Darrein Presentment, was designed to weaken the influence of the Church as a source of baronial power. Since many bishops held land of lords and had vassals, who in turn held land of them, they exercised a form of justice, not to be confused with the justice handed down by the strictly Church courts. Any jurisdiction that these courts had was on a local basis and governed, not by Church law, but by customary practices of baronial courts. Another writ, subsequently issued, was that of Utrum. This assize, Utrum, submitted the question

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[12]Carter, op. cit., 30-31.

[13]Ibid., 31-32.

whether a piece of land in the hands of the Church was held as frank almoign (tenure by divine service, no military service demanded) or by an ordinarily feudal tenure to the jury of twelve who would decide for or against the King.[14] As in the case of the writ of Darrein Presentment, it was concerned with the right of the plaintiff to obtain a royal writ ordering an inquiry to decide whether land held by the Church was lay or Church land.[15]

Still another writ which Henry II enacted as a measure to weaken the barons was that writ of right in a lord's court, whereby Henry directed that no man need answer for his freehold without a royal writ. In other words, if the plaintiff in a baronial court case claimed certain lands held by the defendant, the defendant need pay no attention unless the plaintiff appeared with the king's writ, "breve de recto tenedo", which was addressed to the lord and which directed him to do "full right" to the plaintiff in his court, and if he did not, the sheriff would. The lord was thus reduced to the status of a mere official of the king.[16]

Hitherto any question regarding the right to ownership of land held by any free tenure, would have begun in the lord's court and would have been decided by battle. Henry II

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[14]Adams, op. cit., 106-7.

[15]Carter, op. cit., 33.

[16]Ibid., op. cit., 28.

established the principle, in issuing writs, that no man need answer for his free tenement, that no freeholder's tenure should be called in question, without a royal writ directing an inquiry into his title. Armed with the royal writ, the demandant could appear in the manorial court and claim the land. The man in possession, called the tenant, would deny the claim and either accept battle or put himself upon the Grand Assize.[17] If he chose the latter course, the case then would pass out of the local courts. The King's Court thus took jurisdiction over all serious crimes, disturbances of seisin and ownership of freehold. These new writs, of course, could only be brought into the King's Court.[18]

Moreover, the development of writs served to place the royal authority in a position of almost absolute power, and as the instrument by which the whole structure of a national system of justice was established, the writ was very significant.[19] The new procedures drew many cases out of local courts and brought the barons under royal supervision. The control was so effective that it was extremely difficult for

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[17]Medley, op. cit., 382-3.

[18]Carter, op. cit., 33.

[19]George Burton Adams, Council and Courts in Anglo-Norman England (New Haven: Yale University Press, 1926), 140-42.

a lord to restrain his vassals from appearing in royal courts.[20]

While the writs were important sources for the expanding jurisdiction of royal justice, other acts also served as a means of reducing the influence of local courts. One such act was the Assize of Clarendon, issued by Henry II in 1166 which, among other things, hit at the private jurisdiction and which sought to claim a monopoly for royal over local jurisdiction.[21] The Assize of Clarendon gave the royal judges the power to preside over baronial courts. This put a rather decisive check to the hitherto uncontrolled baronial system of justice--or injustice--with its private dungeons and its private gibbets. It brought everything and everybody under the eyes of the king's justices.[22]

Along with the baronial courts, the shire courts, operated by the sheriffs, were doomed also to decline. Often partisan to their friends and grown greedy with the years of power, the sheriffs were to fall by the wayside along with the other local courts. In 1170, Henry ordered the Inquest of Sheriffs and removed the majority of them from their offices, acting on the grave complaints, which he heard from

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[20]Barnaby C. Keeney, Judgment by Peers (Cambridge: Harvard University Press, 1949), 47.

[21]Naomi D. Hurnard, "Assize of Clarendon," English Historical Review, LVI (July, 1941), 398.)

[22]David H. Montgomery, The Leading Facts of English History (Boston: Ginn and Company, Publishers, 1897), 397.

all sides, of their gross misconduct and extortion.[23] By removing many of the sheriffs, Henry sought to reduce their position, along with that of the feudal baronage, to a subordinate status.[24]

The power of the sheriffs was further weakened by such ordinances as that involving the infraction of the King's peace. Thefts, scuffles, blows and wounds were in the jurisdiction of the sheriff or the manor, unless the plaintiff chose to insert the words "de pace Domini Regis infracta," or "infraction of the King's peace." In that case, the King's Court took cognizance, and the sheriff's jurisdiction was ousted.[25]

Furthermore, the king could call up a cause from the sheriff's court by a writ of "Pone." If after judgment in the lower court it was sought to establish error, the record was ordered up to Westminster to be examined for errors on its face. The sheriff had no choice but to release the case to the higher court.[26]

While it is true that the judicial reforms of Henry II took a great deal of business out of baronial courts, it is

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[23]A. T. Carter, A History of the English Courts (London: Butterworth and Company, Ltd., 1935), 34.

[24]George Burton Adams, Constitutional History of England (New York: Henry Holt and Company, 1934), 321.

[25]Carter, op. cit., 29.

[26]Ibid., 35.

misleading to state that the reforms caused widespread indignation on the part of most of the barons. While losing power, the barons gained order and stability which was more important to them.[27] We know from later records that the barons were frequently involved in cases in the new courts, and rarely did they demand judgment by their peers rather than by a royal court. They demanded only justice "according to the legitimate custom and assizes of the realm."[28]

Henry II destroyed private jurisdiction through indirect rather than through direct methods. He called upon no man to prove his right, and in form, he took no man's right away. He set up an alternative, competing system, with better procedures and results, to which he gave certain rights of supervision. No litigants were obliged to abandon local courts for the king's court, yet various writs were offered to assist their removal from one to the other. The attraction of the new was so strong that it was able to overshadow and weaken the baronial court as a real rival of the state's jurisdiction.[29]

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[27] F. M. Powicke, Medieval England 1066-1485 (London: Thornton Butterworth, Limited, 1931), 76.

[28] Keeney, op. cit., 47.

[29] George Burton Adams, Council and Courts in Anglo-Norman England (New Haven: Yale University Press, 1926), 166-8.

CHAPTER IV

DEVELOPMENT OF THE COURT SYSTEM

Neither writs nor laws were of much importance or avail without a system of constant, regulative action. Royal participation in justice was limited without direct action by the king in the individual subject's own immediate area. Such participation could only come about with the process of making royal justice available to the subject on the spot, so that he would not have to make the long and costly trip to Westminster. Earlier kings such as Henry I had, on occasion, used judges, who traveled from time to time throughout the country to hear complaints, but it remained for Henry II to establish the circuit judges as a permanent form.[1]

In the first decade of his reign, Henry II followed the practice of his predecessors in sending out occasional judges at intervals of two or three years to hear pleas in most of the shires. Even then, not all of the shires benefited from the practice of obtaining royal justice, and there was still a need for a more stationary form. The circumstances of Henry's quarrel with Becket created an impulse for popular

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[1]Dudley Julius Medley, English Constitutional History (B. H. Blackwell, 1913), 391-2.

reform, and from the date of the Assize of Clarendon, 1166, the visits of the justices are put into regular form by the king.[2] After deliberation with his sons, bishops, lords, barons, knights and others connected with the royal court, Henry II directed that justices be sent into the six parts of his kingdom. Three justices were to be sent into all parts of the kingdom, each of whom had sworn an oath that they would maintain order.[3] By the Assize of Clarendon, the justices were instructed to try before themselves all men accused of the crimes of murder, larceny, robbery, or harboring criminals, while making the tour of their circuits. The visits were begun in the spring of 1166 and carried out again that summer, and thereafter. The proceedings of their investigations swell the accounts of the Pipe Rolls, and the entries would seem to suggest that an active attempt was made to invigorate and invade the local administration of justice. In this initial measure, the Assize of Clarendon, a distinct step forward had been launched in the policy of bringing the royal jurisdiction into closer connection with the popular courts.[4]

To meet the difficulty of court procedure that had arisen under the new court system, King Henry II instituted

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[2]Ibid., 392.

[3]Ralph de Diceto, Historical Works of Ralph de Diceto, Vol. I of 2 Vols., Edited by William Stubbs (London: Longman and Company, 1876, Rolls Series, No. 68), 404.

[4]William Stubbs, Constitutional History of England, Vol. I of Two Vols., (Oxford: Clarendon Press, 1875), 470-1.

in 1170, the sixteenth year of his reign, the practice of sending out justices to travel over the kingdom with greater regularity than before to hear complaints of his subjects on the spot.[5] In 1173, the principle of circuits was first introduced,[6] and in 1176 the number of circuit judges was increased to eighteen judges, and they were sent into all the counties of England from Northumberland to Cornwall.[7] All in all, there were six regular circuits with three judges assigned to each circuit, according to the procedure established in 1166, except that they were now made a permanent part of the royal court system by the Assize of Northamptom. Before that time, the visits had been determined on a year to year basis, depending on the whims of the king.[8]

In 1178, Henry II finding that the multiplicity of justices resulted in considerable confusion as to the jurisdiction of each particular justice, decided to reorganize the system of circuit judges. He selected two clerks from the Curia Regis, his council of advisors, and three laymen to stay at Westminster and hear certain important cases.

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[5]F. A. Inderwick, The King's Peace (London: Swan Sonnenschein and Company, 1895), 59-60.

[6]Medley, op. cit., 393.

[7]Inderwick, op. cit., 60.

[8]William Stubbs, Historical Introduction to the Rolls Series, Compiled and Edited by Arthur Hassall (London: Longmans, Green and Company, 1902), 133.

Then he divided England anew into circuits and sent out circuit judges in the number of eight to represent him in the courts of the hundred and shire.[9] In 1179, the kingdom was rearranged further into four circuits, one of which operated within the framework of the Curia Regis and answerable to the five justices of the bench appointed in 1178.[10] It is apparent that a permanent court system was arising out of the operations of the circuit judges. Before we turn to the development of the circuit court system, it might be well to discuss more thoroughly the duties of the circuit judges and how they contributed to the evolution of the court system.

Beginning with the Assize of Clarendon, the commissions of the circuit judges were established defining their function as a part of the royal plan of justice. The mission of the circuit judges was called the "eyre." Each eyre had a commission, which specified its duties. These might include the ascertaining of the king's fiscal rights, the enforcement of the frankpledge obligation, or the obligation of all men to ferret out crime, the levy upon the hundreds of the murder fines when unknown persons were found dead as well as the trial of crimes.[11]

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[9]Arthur Cross, A Short History of England and Greater Britain (New York: The Macmillan Company, 1939), 78.

[10]Stubbs, op. cit., 135.

[11]Frederick C. Dietz, Political and Social History of England (New York: The Macmillan Company, 1932), 65.

Still other judicial duties established by the Assize of Clarendon were those of Gaol Delivery, Oyer and Terminer. Commissions of Gaol Delivery were preliminary investigations to prevent the oppression of local magnates. Those of the latter two were for the purpose of hearing and determining action in criminal cases, including treason, felony and trespass, and others.[12]

The Assize of Northamptom, 1176, provided for much the same as its predecessor, except that it required more vigorous enforcement of the law by the justices and stronger punishment for criminals. It further provided for the outlawing of fugitives by the justices.[13] The justices were to hear every sort of plea that was cognizable under royal writ touching fiefs of half a knight's fee or less,[14] or those involving robbery, murder and theft as presented by the local juries. The justices then sent the suspects through the ordeal to establish innocence or guilt.[15]

Also, the circuit judges were directed to hear all cases that involved escheats: lands that were confiscated

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[12]Medley, op. cit., 394.

[13]Walter of Coventry, The Historical Collections of Walter of Coventry, Vol. 1 of Two Vols., Edited by William Stubbs (London: Longman and Company, 1872, Rolls Series, No. 58), 257-9.

[14]William Stubbs, Constitutional History of England, Vol. 1 of Two Vols., (Oxford: Clarendon Press, 1875), 384.

[15]Barnaby C. Keeney, Judgment by Peers (Cambridge: Harvard University Press, 1949), 46.

by a higher lord or by the king for violation of vassalship, conviction of crime, or ending of a contract. An escheat resulting from forfeiture was preceded by a judgment, usually by a jury. Even escheats resulting from lack of heirs were decided by judgments. The justices were to inquire about them and to report them to the king for judgment.[16]

A session of these justices in eyre saw assembled before them the officials of the shires, the hundreds and the liberties, and all who were bound by their tenure to do suit at the shire court, together with the twelve men representing each hundred and chosen by two or four knights who had been nominated by the bailiff of the hundred and, finally, the reeve and four men from each vill. These representative members of hundred and vill were all sworn to speak the truth. Then a set of questions, known as the Articles of the Eyre, and drawn up by the king's councillors, were delivered to them in writing to be answered by a certain day. A list of suspects whose escape should be prevented was in turn given to the judges. The juries of the hundred appeared before the judges on the appointed day to be heard by the judges, who then gave their opinions on the crimes reported by the juries. Such was the usual procedure before the circuit judges of Henry's circuit court system.[17]

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[16]Keeney, op. cit., 46.

[17]Medley, op. cit., 387-8.

With the establishment of circuit judges by Henry II, an extraordinary and occasional procedure of bygone years was transformed into a regular and ordinary system of justice brought to the suitor's door. In this new King's Court, there was an impartial judge, attendance could be compelled, and recognitors could be sworn while in the baronial courts the judges were the suitors, compurgation was in use, and the sheriff or baron might be partial or even quite corrupt. The king offered a superior procedure, with the natural result that he was soon able to take practically all of the judicial business.[18]

The formation of the circuit courts led directly to a new creation; a permanent central court with specially appointed justices, trying the same kind of cases as those tried in the circuit courts and using the same prerogative procedure; to all intents and purpose, a circuit court in continuous session, differing only from the circuit court in that it was permanently located and easily within the reach of those who felt the need of a stationary court. For there were many who found it inconvenient to attend even the local court sessions held by Henry's travelling judges, and it was for them that Henry determined to establish a court before which they could appear to obtain royal justice.[19]

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[18]A. T. Carter, A History of the English Courts (London: Butterworth and Company, Ltd., 1935), 36.

[19]George Burton Adams, Constitutional History of England (New York: Henry Holt and Company, 1934), 109.

Therefore the king placed the Curia Regis itself at the disposal of ordinary men, and it is customary to date this arrangement from 1178, as already noted, when Henry directed that five men, two clerks and three laymen be detailed to hear all complaints and to remain at Westminster in order to be readily available to all freemen.[20]

Under the reign of the first Henry, we see the twofold form of the King's Court, the great Curia Regis, formed by the whole feudal aristocracy of the kingdom, and the smaller Curia of the intimate officials and advisors of the king in practically permanent session; the latter also acting as a special court for financial cases--the exchequer. On this model, Henry II now established what we may call another small Curia Regis in 1178, apparently of a more professional character to be in permanent session for the trial of any and all cases. The differentiation in the function of the Curia Regis was taken a step further in separating the financial from the legal processes. A step was made, moreover, toward the creation of a specialized judicial system and an official body of judges.[21]

The newly-created central court was to hear suits between parties, common pleas, arising anywhere in the kingdom. Nothing is said of any connection of the justices of this

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[20]Cross, op. cit., 78.

[21]Adams, op. cit., 321-2.

court with the Curia Regis itself, but it is to be assumed that such a connection probably existed. It seems beyond question that the new central court was at its foundation a Curia Regis, but in the new sense--a special court of commissioners, a court growing out of the possibilities of the king's prerogative, exactly as did the circuit courts, except that it was a single central court for the whole kingdom. Like the circuit court, it would use, from the beginning, the new writ and jury processes which did not belong to the procedure of the old Curia Regis, and it would be limited in scope by the terms of its commission. It was consciously a new creation; not an old body assigned to, or taking up, a new use. Its jurisdiction, like that of all courts of the time, was final, although cases of a questionable nature could be referred to the king and his council of advisors as the Curia Regis came to be known.[22]

Thus, the central court extended its jurisdiction widely, continuing at all times to be the tribunal for the trial of great men and great causes, of crown pleas, and of cases where justice had failed in the local courts. Its field of criminal jurisdiction was enlarged by extending the list of crown pleas, which could be tried only in royal courts, and on the civil side, as we have seen, its business was increased by the use of writs. The law that Henry's central

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[22]George Burton Adams, Origin of the English Constitution (New Haven: Yale University Press, 1912), 137-9.

court applied was more accurate and the procedure more rational than that of local courts, private or public.[23]

In "specializing" both the system of law and the men who administered it, Henry II helped to develop a professional staff of jurists.[24] The intermittent and somewhat definite character of the circuit judges no longer sufficed for the purpose; there was more need for professionalism, the cultivation of a professional pride. By constant experiment and culling of his personnel, and with the passage of time, Henry II managed to create the nuculus of a well-educated and well-trained professional body of jurists.[25]

Along with the growth of professional judges came the foundation of three courts of common law; namely, the Court of the Exchequer, concerned with royal revenue cases; the King's Bench which grew out of the many new and difficult questions arising from the new royal justice concerning important criminal cases and other suits in which the Crown was involved, and the Common Pleas Court which concerned itself with lawsuits between private parties.[26]

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[23]W. E. Lunt, History of England (New York: Harper and Brothers, 1945), 116.

[24]C. R. Fletcher, An Introductory History of England (New York: E. P. Dutton and Company, 1907), 142.

[25]Medley, op. cit., 393.

[26]Lynn Thorndike, The History of Medieval Europe (Cambridge: The Riverside Press, 1949), 384.

Henry II set out to supply what the times demanded. Secure possession of property and a ready means of establishing a title to land were the commodities that he offered the freeholders of England. His judges protected the man in possession by refusing to recognize the legality of seizure of land without going through proper procedures, and for establishing the facts of the case, the king put at his subject's disposal, machinery available hitherto only as a special favor at a high price, and the use of a jury of neighbors in place of the judicial duel. In the King's Court, the landholder could obtain a judgment far more rapidly than in the feudal or communal courts, where the long-drawn-out ritual of customary procedure had to be followed. Further, the litigant could be sure that execution would follow a judgment, because the king had means of enforcement that no one else could command. If he preferred the older procedure, he could apply to the king for a writ commanding his lord to hear the case in his court. Normally the litigant would prefer the King's Court, which as we have seen, was more efficient and more just in the type of decision handed down by it.[27]

With a system of royal courts in process or formation, with a prerogative right to control procedure and with a strong financial inducement in the way of judicial fees and

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[27]Helen Cam, England before Elizabeth (London: Hutchinson's University Library, 1950), 89.

fines (all of which went into the Royal coffers) there was every attraction to the king to enter the fields of civil and criminal jurisdiction, and there was no obstacle strong enough to bar his way. The feudal courts had been pushed largely into the background by the rush of the people to obtain the royal justice which had proved to be cheaper and fairer than the justice of local courts. Also, the Church courts had been forced, in large measure, to surrender much of their jurisdiction to Henry II while retaining their control over the faith and morals of the English people.

At last, the king's peace served to protect and have a meaning for all, with the right of all to beseech the king's interference if that protection were violated or interferred with by any person or persons. All crime, both its prosecution and its punishment had been brought gradually under royal control; all because of the king's desire to bring England out of social and political chaos and of his desire to restore the worth and strength of all that the Crown had stood for in former days.

CHAPTER V

RISE OF THE MODERN JURY SYSTEM

The most important innovation effected by Henry II was the introduction of the jury as a normal part of the legal procedure of the King's Court, in contrast to earlier kings who had strictly controlled its occasional use. Roman emperors had used the sworn inquest (out of which the jury grew) to establish locally certain rights of the imperial treasury. Frankish kings had used the inquest to find the extent of royal lands areas and to right some local wrongs. Duke William used it to ascertain royal rights, and his Norman successors employed juries to establish their own fiscal and administrative rights. At all times, it remained a royal institution, concerned solely with the king's business, or employed for the business of others only by his special permission.[1] Until the reign of Henry II, the jury or sworn inquest was not used in lawsuits, but during his reign was to become now a matter of right for the individual who desired to take advantage of this institution to determine guilt or innocence involving property, murder or other cases. What had been heretofore a special privilege of the

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[1] W. E. Lunt, History of England (New York: Harper and Brothers, 1945), 117.

king and of those to whom he granted it, was to become now a right of all subjects and a part of the regular system of royal justice.[2]

The normal method of settling disputes had been trial by battle, in which the contestants or their champions had fought the matter out with either swords or cudgets. Even if a contestant did happen to win out in the trial by battle, his opponent's heirs could still resort to force to persuade the winner to surrender his claim. Small wonder, then, that there were many who preferred to leave the case to the decision of twelve knights from the neighborhood.[3]

Thus, it is to Henry II that we must look for the establishment of that inquest by recognition as a part of the settled law of the land which finally resulted in the modern form of trial by jury. In tracing the growth of the jury system under Henry II, it would be best to remember that the word "assize" was used to denote at least three and possibly more institutions of Henry's legal system: an assembly, the ordinance of such an assembly, and (more important in the development of the jury) a particular remedial method of judicial procedure. For the neighbors summoned to take part in the inquiry themselves came to be called the Assize.[4]

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[2]Charles Homer Haskins, The Normans in European History (Cambridge: The Riverside Press, 1915), 110.

[3]David H. Montgomery, The Leading Facts of English History (Boston: Ginn and Company, Publishers, 1897), 96.

[4]Dudley Julius Medley, English Constitutional History (Oxford: B. H. Blackwell, 1913), 381-2.

The essential factor in the growth of the jury is that it ceased to be an exclusive privilege of the king and became part of the regular system of justice. In this connection the various ordinances that Henry II issued were important in helping to bring about the development of the jury within the framework of royal justice.[5] The first of the ordinances that can be shown to have contributed to the growth of trial by jury is the Constitutions of Clarendon, a product of the famous controversy between Henry II and Archbishop Thomas Becket and published in the year, 1164. The king believed that the Church courts should surrender all of their jurisdiction, but in so doing the clerics were not to be deprived of the ordinary Englishman's right of having his wrongs corrected in an equitable and just manner. It was in the Constitutions that Henry first made mention of calling twelve men of the neighborhood to come before a court and to give information in a sworn inquest.[6]

The fabric of our jury system actually commences, however, with the Assize of Clarendon in 1166. For due to the unforseen death of Becket, Henry II had been forced to relinquish such innovations as the use of the jury as a permanent part of ordinary trial procedure under the threat

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[5]Charles Homer Haskins, Norman Institutions (Cambridge: Harvard University Press, 1925), 198.

[6]Albert White and Wallace Notestein, Source Problems in English History (New York: Harper and Brothers, Publishers, 1915), 41-2.

of a national interdict which would have placed England in the position of being denied the privileges of Christian worship and sacraments connected with marriage and death. However, in the provisions of the Assize of Clarendon Henry II renewed the principal of trial by jury. Twelve lawful men of each hundred, with four from each township, were sworn to present those who were known or reputed as criminals within their district for trial by ordeal, and as jurors they were to further evaluate the charges brought against the accused.[7]

Before Henry II instituted the Grand Assize in which a man threatened with loss of his property as defendant in a suit and who did not wish to resort to judicial combat, cases involving civil matters were settled, as noted, by means of the old-established method of the duel in order to establish ownership. Under the Grand Assize, however, the claimant was allowed to obtain a writ empowering the sheriff to "impanel" a jury of twelve men who would investigate the facts in the presence of regularly-trained judges. These would instruct them concerning the law of the case.[8] Thus in the most important lawsuits a recognition by jury was substituted for the former rough and ready method in civil matters.[9] In criminal appeals, however, neither the Grand

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[7]J. R. Green, A Short History of the English People (New York: Bigelow, Brown and Company, Incorporated, 1892), 210.

[8]C. R. Fletcher, An Introductory History of England (New York: E. P. Dutton and Company, 1907), 143.

[9]William Stubbs, Lectures on Early English History, Edited by Arthur Hassall (London: Longmans, Green and Company, 1906), 79-80.

Assize nor its predecessor, the Assize of Clarendon permitted the use of the jury by all Englishmen and only by the issuance of writs were the people allowed to resort to this institution. The jury system was developed slowly under the various assizes that Henry II issued. In a proprietary action, the tenant could put himself upon the Grand Assize, as we have seen. He could also begin proceedings in a royal court by obtaining a royal writ, which would order an inquest of twelve men to hear the case.[10] In such cases, the parties concerned were compelled to abide by the award of a jury, and in all of them the decision was rendered by this jury. Aided by these assizes, no man could be compelled to defend the possession or the ownership of his freehold by judicial combat, since rational trial by means of a jury could be had by the defendant who desired it; no man could be dispossessed of his freehold without a judgment; no man could lose his freehold by judgment, unless he had been summoned by a writ, and the question of fact determined by the jury. The assizes served to protect the weak against the arbitrary action of the strong, and by means of drawing cases into royal courts helped to develop the jury system, especially where civil matters were concerned.[11]

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[10]Sir Frederick Pollock and Frederic William Maitland, History of English Law, Vol. 1 of Two Vols., (Cambridge: University Press, 1898), 149.

[11]Lunt, op. cit., 119.

One of the assizes that aided the development of the civil jury, as apart from the criminal jury, was the assize of Novel Disseisin which allowed any freeholder, who had been recently dispossessed of his land, to obtain a writ from the king which would put the matter before a sworn inquest of his neighbor. Knowing the facts, this type of civil jury could give a verdict on the issue instantly, and if it was favorable to the plaintiff, he recovered his property almost immediately.[12]

The assize of Mort D'Ancestor which protected heirs from eviction at the perilous time of inheritance, called for a jury decision, as did the assizes of darrein presentment and utrum which made it convenient for one to have the civil jury present in order to decide a question of fact.[13]

Evidence that the jury was accessible to all in a further range of civil cases is furnished in the Assize of Northampton of 1176. This provided that when the lord denied to the heir of his deceased vassal possession of his fief, the king's justice could ask a jury to determine the kind of possession the ancestor had as a necessary step in determining whether the heir should have possession or not, and at least this much of the question of inheritance was removed from the jurisdiction of the baron's court. Moreover clause

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[12] A. T. Carter, A History of the English Courts (London: Butterworth and Company, Ltd., 1935), 30-31.

[13] Ibid., 31-32.

five of the same Assize provides that in case of any recent disseisin the justice could direct a jury to declare the facts on which possession should be based. The clause speaks of such a disseisin as made "Super Assisam", implying the opening of the jury in such cases by the earlier writs mentioned above in connection with the development of the civil jury.[14]

Although the jury system became the usual trial process where civil causes and even criminal causes were involved, conservative tendencies were in evidence. There were cases in which a defendant could, if he chose, reject the newly-adopted mode of trial, and claim the ancient right of purging himself with oath-helpers, or of picking up the glove that the plaintiff had thrown down as a gage of battle. Even a prelate of the Church would sometimes rely rather upon the strong arm of a professional pugilist than upon the testimony of his neighbors. And within the walls of the chartered boroughs, men were conservative in all that would favor the free burgher at the cost of the despised outsider. Londoners thought that civil trial by jury was good enough for those who were not citizens, but the citizen must be allowed to swear his innocence to any charges of debt or trepass by the oath of his friends. If enough would

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[14]George Burton Adams, Origin of the English Constitution (New Haven: Yale University Press, 1912), 126-7.

swear as to the innocence of the citizen, he could avoid the necessity of a trial by jury.[15]

In theory and in practice, it was only by mutual consent of both parties that a jury was employed in trial procedure, both criminal and civil, and it was only the constant emphasis of its usage by judges that made petty prejudices and opposition give way to the jury. These judges demonstrated that while one chance prevailed under the old procedure, under the new, one might have a jury, selected from the men of the neighborhood who would be most likely to know what the facts were, and who were required by the judges to answer the specific question submitted to them from their knowledge and on their oath. They revealed that the man who was confident that he had a good case, if he could only get the facts before the court, could win over a poorly-presented case.[16]

That the process of obtaining a jury trial was not always smooth and speedy is shown by the tedious steps required in many cases to get such a trial. The defendant was still allowed to postpone the trial by resorting to any measures permissible by law, and often the choice was still left to the defendant to decide between trial by battle or by assize. If he were the stronger of the two claimants, he

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[15]Frederic W. Maitland and Francis C. Montague, A Sketch of English Legal History (New York: The Knickerbocker Press, 1915), 54-55.

[16]Medley, op. cit., 386.

naturally would claim the right of trial by battle.[17] It would seem that it remained for a later generation to correct the evils of such a system as established by Henry which though imperfect was still a remarkable institution, in that it established the pattern for future trial procedure.

Undoubtedly the use of the juries contributed to the growth of a mass of precedence that was to be molded into the civil law of the English nation. The enormous growth of business in the royal courts as a result of resort to juries served to increase the importance of having an uniform civil law for the whole of England.[18] Henry's reforms of civil law dealt with the four or five types of cases that commonly arose. One was, of course, the Grand Assize and had to do with ownership of land and the procedure for determining it contributed to the growth of civil law. Others had to do with possession of land and were known by separate titles.[19] Having declared that it was illegal to dispossess a man unjustly and without trial, and that an heir ought not to be hindered from acquiring possession of land to which he was entitled, Henry directed his justices to inquire into cases where complaints were made of illegalities of this sort and

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[17] Ibid., 383.

[18] George Burton Adams, Constitutional History of England (New York: Henry Holt and Company, 1934), 104.

[19] Novel Disseisin and Mort D'Ancestor, see pp. 26 and 45.

issued writs of Right and Praecipe concerning them.[20] Let it suffice here to draw attention to the fact that they not only formed a basis for the foundation of the jury system, but as writs of instructions, they also provided a basic part of the civil law affecting the cases to be heard by these juries.[21] Without a form of instruction, which these writs furnished both the jury and the judge, no case could be settled. By overlooking local differences and applying uniformly the king's law as laid down by his diverse writs, the judges heaped precedent upon precedent, to lay the foundations of English civil law.

While the growth of the civil jury and civil law are readily discerned from a study of Henry's utilization of the various writs, the growth of the criminal jury and law are much more difficult to determine from what we now call the grand jury. In criminal cases, the jurors actually acted as grand jurors in the modern sense, declaring whether or not they suspected the accused to be guilty of the crime imputed to him. And while the civil jury deliberated rationally and returned a verdict according to the facts of the case in matters concerning property, the criminal jury allowed the ordeal by water for a rustic, the ordeal of iron, for a person of high rank, or the method of compurgation to determine

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[20] See above pp. 27-28.

[21] Frederick Marcham, A History of England (New York: The Macmillan Company, 1937), 131-32.

whether either a rustic or a nobleman were guilty or not. A more efficient and error-proof method would have to await more modern times.

In regard to criminal procedure and law, the growth was slow but more apparent than the development of the criminal jury. In the repression of crime, the difficulty had been to determine who committed the crime and in getting the criminal arrested and before the court for trial. The aim of the new procedure was to overcome this difficulty and at the same time to furnish a more trustworthy method of trying the accused. Both of these changes were accomplished by the criminal law as perfected by Henry II through the use of what we now call the grand jury.[22] The doctrine of felony was developed, capital punishment for murder arose, and the specially royal processes of indictment and inquest were improved.[23]

The first of the measures that furthered the growth of criminal law was the Assize of Clarendon which laid the foundations for detection of crimes and punishment of crimes by calling for a jury of twelve men to publically accuse all men in their hundred or in their manor guilt of robbery, murder or theft. In 1176 appeared the Assize of Northampton which

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[22]Adams, op. cit., 114-15.

[23]Naomi Hurnard, "The Anglo-Norman Franchises," English Historical Review, LXIV (July, 1949), 311.

called for a jury to indict those guilty of forgery, and the aforementioned crimes. Those accused were to suffer ordeal and to lose a foot and the right hand if they failed.[24] Henry II introduced the inquest[25] into the England legal system when he forced it upon the ecclesiastical courts in 1164 by the Constitutions of Clarendon. Under this document, laymen were not to be made answerable to a crime upon a mere unsworn suggestion of ill fame. Someone had to stand forth and commit himself to a definite accusation, or else the ill fame had to be sworn to by twelve lawful men of the neighborhood.[26]

At the Assize of Clarendon in 1166, Henry spoke of his concern and that of his advisors for the preservation of peace and the maintenance of justice; and for these purposes

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[24]A. T. Carter, A History of the English Courts (London: Butterworth and Company, Ltd., 1935), 129.

[25]Naomi D. Hurnard, "Assize of Clarendon," English Historical Review, LVI (July, 1941), 377. To look for earlier precedents of the grand jury, one must go back into the time of the Danish king of England, Ethlered, when the whole village took the iniative in giving information which would lead to conviction and execution. It is also significant that the public duty of censure was later employed in the courts of the Frankish Empire, from whence it was brought to England by William the Conqueror, who used it to gather information in judicial cases where the interest of the monarch was involved.

[26]Sir Frederick Pollock and Frederic William Maitland, History of English Law, Vol. 1 of Two Vols., (Cambridge: University Press, 1898), 151. These men of the neighborhood are not to be confused with the twelve men of the assize or civil jury.

he instituted a new procedure that enlarged the use of the grand jury. He required the appointment in every hundred and every vil of small groups of men whose duty it would be to appear before the king's justices and sheriffs and to declare upon oath the name of those suspected of robbery or of harboring criminals. The act of making this declaration under oath was called "presenting"; hence the "presentment jury."[27]

The use of the presentment jury remained a royal prerogative, reserved for the King's courts. Suspects accused by the jury could be tried in the King's Court, instead of standing trial in the private courts. The presentment jury served to limit the power of the barons, while at the same time it helped to maintain law and order and to protect individuals against frivolous or spiteful accusations.[28] The jury of presentment in time became the regular way of detecting crimes and bringing suspects before the itinerant justices on circuit. Sometime before their arrival, this jury was impaneled by the sheriff, and it prepared a report of all crimes that had been committed within its area, or which they suspected had been committed. Often it not only presented the crimes as a jury of indictment, but also acted as a trial jury to determine guilt or innocence on the basis of

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[27]Marcham, op. cit., 129.

[28]W. E. Lunt, History of England (New York: Harper and Brothers, 1945), 118-9.

its knowledge of the facts.[29] It is because of this action that it is indeed difficult to separate the various forms of jury trial from one another. It remained for later kings to improve upon the system and to separate the grand jury from the criminal and the civil jury.

The growth of the jury system well may be called the pivotal, or perhaps the causal, institution in the process of the growth of law, for it was the desire to use the jury in a great many cases which led to the extension of the writ and to the employment of circuit judges and permanent central judges. As the people saw in the use of juries a means of procuring better justice, the business of the royal courts increased and led to the creation of more courts. The functioning of these courts involved the creation of a Common Law that was to include all of these growing legal innovations of a truly great legal king, Henry II.

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[29]Frederick Dietz, A Political and Social History of England (New York: The Macmillan Company, 1932), 64-5.

[30]Adams, op. cit., 86.

CHAPTER VI

CREATION OF THE ENGLISH COMMON LAW

The young man who became king of England in 1154 was the child of his age, and it was a great age. Europe, battered and broken by the three-fold attack of Vikings, Magyar and Moslems in the Ninth Century had been laboriously rebuilding her life, reconstructing her society, renewing her trade, reforming her religion up to the point where she had sufficient wealth to afford non-productive artistic and intellectual activity.

England felt the stir of the new awakening even under Stephen. The new writers from the European continent on Canon Law were being studied in the new religious house of England. Scholars such as Vacarius, an Italian, lectured on Roman Law to the students at Oxford. And in the second half of the Twelfth Century, England's scholars and writers could hold their own with those of any country of Northern Europe.[1] From these writers would come the intellectual impetus that would soon produce the English Common Law, a product of centuries of local customs welded together by the great legal minds of Henry II's era. Led by Glanville and by Henry II

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[1] Helen Cam, England before Elizabeth (London: Hutchinson's University Library, 1950), 86-7.

himself, England was to have at last, a law common for the entire realm.

An unforseen outgrowth of the new legal system of Henry II, but which has been of the greatest value and consequence in the history of the Anglo-Saxon world is the Common Law of England. The customary law which had grown up in the local courts during Saxon times was full of variations and differences from one county to another, and this situation was not changed even when the feudal law was superimposed upon it, which was in its main features common everywhere and regulating such an important concern as landholding.[2] There were still hundreds of independent municipal and manorial courts, and an infinite variety of local custom and usage, which each local judge interpreted as he pleased. The result was an inequality of justice in every province, emphasizing the great need for a law that would be common to the whole realm.[3] There was a danger that a series of private systems of law were developing such as had eventuated on the nearby Continent,[4] and the more real danger that Canon Law would soon envelop the law of the land. As it was, Canon Law furnished

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[2]George Burton Adams, Constitutional History of England (New York: Henry Holt and Company, 1934), 110-11.

[3]Lynn Thorndike, The History of Medieval Europe (Cambridge: The Riverside Press, 1949), 383.

[4]Frederick Deitz, A Political and Social History of England (New York: The Macmillan Company, 1932), 67-8.

a very important source for the growth of the national Common Law, sometimes by repulsion, sometimes by way of attraction. In the Constitutions of Clarendon were the first authoritative restrictions on hitherto unwritten custom. And under Henry's leadership, many bishops and other clergy served as his royal judges. Their concept of law did much to influence English law and to rationalize it.[5]

The history of the English Common Law unlike that of the Roman Law is not marked by any external changes in the government, although the character of the monarchy itself was profoundly altered. One has seen the beginnings of Common Law in the archaic codes of Anglo-Saxon kings and in the local municipal and manorial courts, but it found its greatest expansion in the laws of Henry II;[6] the enforcement of these statutes overruled all other law and merged together into the English Common Law.[7]

Probably the most important statute that affected the growth of the English Common Law was the Assize of Clarendon. Whether or not it owes some part of its importance to the loss of the legal acts that had preceded it, this document is the most important of Henry's reign for an understanding

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[5]Sir Frederick Pollock and Frederic William Maitland, History of English Law, Vol. I of 2 Vols., (Cambridge: University Press, 1898), 131-4.

[6]William Seagle, The History of Law (New York: Tudor Publishing Company, 1946), 171.

[7]George Burton Adams, Council and Courts in Anglo-Norman England (New Haven: Yale University Press, 1926), 146.

of the nature and the beginning of English Law; the most valuable and far-reaching since the Norman Conquest of England; whether it be regarded in its significant bearing on legal history or in its ultimate constitutional results. For it established the Court system that was to amass the wealth of legal material to be welded together into one unified code of law. This document, moreover, set up the machinery by which the confusion of too many courts and too many varieties of law could be replaced by one law and one justice for all Englishmen alike, regardless of rank or position.[8]

Direct legislation might have played a big part in unifying English Law, but administrative organization and indirect legislation was even more influential. For an outgrowth of the provisions of the Assizes of Clarendon and Northampton was the visits of the circuit judges, the establishment of a permanent judicial body and the evolution of the whole system of writs that brought about the supremacy of the Common Law of the land over the feudal law of the manorial courts or the ecclesiastical law of the Church.[9] The administration and enforcement of the law through the judicial system and processes resulted in new courts of more

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[8]William Stubbs, Constitutional History of England, Vol. II of 3 Vols., (Oxford: Clarendon Press, 1875), 469.

[9]Dudley Julius Medley, English Constitutional History (Oxford: B. H. Blackwell, 1913), 101.

extensive and summary powers, new methods of getting the defendant or the accused before the court and new methods of proof, not expressly mentioned in the legal acts of Henry II.[10]

The jury system did not form a regular part of the state judicial system in the beginning. If a private man wished to get the facts in his case before the court by the verdict of a jury, he must get the king's permission to have a jury trial. This permission was given in a writ, describing the case and giving the justice the authority to try that particular case. Hence arose the principle of the Common Law that every case must open with a writ, the original writ. Hence also arose the principle that the writ must describe accurately the action to be tried, for permission to use them in another and the like. Almost at the beginning, the judges began to instruct the suitor who had obtained the wrong writ that he could obtain the correct writ if he only applied for it. From that practice then arose one of the chief characteristics of the first age in the formation of the Common Law, the classification of actions and the multiplication of writs.[11] Some would be granted more or less as a matter of course, brevia de cursu writs; these included

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[10]Adams, op. cit., 130-31.

[11]George Burton Adams, Constitutional History of England (New York: Henry Holt and Company, 1934), 105.

those directed to feudal lords, those directing the sheriff to do justice, those relating to ownership, or those transferring cases from feudal courts to royal courts.

Further in the development of Common Law, definiteness and rigidity were given to the new possessory writs. For example, a writ under the assize of novel disseisin would ask one precise question of the summoned inquest: "Did B unjustly and without judgment disseise A of his free tenement in X since the king's last journey into Normandy?" At countless points an action thus begun would differ from a proprietary action for land initiated by a writ of right; both of them would differ from an action of debt, and so on. Thus between the various writs, the would-be litigant had to make a choice, and out of his choice of action came legal precedents for future court action.[12]

The establishment of a central court, with its circuit satellites, produced a large portion of the Common Law along with the various writs. Especially important was the uniformity of law that the circuit courts produced. In the local courts a variety of customs and laws prevailed, and the circuit judges spread throughout the land knowledge of the one set of legal principles used by the central court. Eventually this legal system was to prevail over the local sufficiently to justify its description as the Common Law.[13]

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[12]Pollock and Maitland, op. cit., 150-1.

[13]W. E. Lunt, History of England (New York: Harper and Brothers, 1945), 116-7.

For while the rest of Europe was influenced by the imperial law of Rome, the law of highly centralized absolutism, England was following a different path. The King's Court rapidly created a body of clear, consistent, and formulated law through these circuit judges.[14] Henry did not set out to make new laws; he only offered new procedures, but in applying the new principles and procedures, his judges were setting up precedents which were being welded together beneath the framework of his royal type of justice.[15]

A book by Rudolph Glanvill who was the chief justiciar of Henry II, that of Tractatus de Legibus et Consuetudinibus Regni, shows the earliest branches of the common law under the titles of legal procedure, criminal law and the land law.[16] In the law of procedure we see one very permanent feature of the Common Law--its dependence upon writs--the Common Law already knows a number of writs which correspond to the various actions of which the King's Court takes cognizance. In the criminal law, the criminal procedure, which

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[14] Adams, op. cit., 324-5.

[15] Cam, op. cit., 89.

[16] Adams, op. cit., 325. This great legal book sketches the course of proceeding the writs used, to assist the memory of those who took part in the administration of the law, and he discusses the principles of feudal right as they applied to the rules of legal procedure and custom. It combined the rules of the new courts, the influence of Roman Law and the influence of Canon Law to weld together into one uniform law.

is based on presentment by a grand jury and trial by the forerunner of the petit jury, exists side by side with the older procedure, based on the appeal, that is, the accusation of the private accuser.[17]

An outgrowth of Common Law was the growth of Equity, which arose to mitigate the rigidity of Common Law, and which was elastic enough to make the Laws of England, a workable instrument.[18] Equity was a natural outgrowth of the right to petition the king for his royal interference, especially for justice where it could not be easily obtained under ordinary common law, and as such was administered by the King's Court, later known as the Court of the King's Bench. While new circuit courts and the central court were created to administer the prerogative of interference with the ordinary procedure, special and difficult cases of equity were reserved to the king's advisory council. The equity procedure was opened and regularized so that it tended rapidly to become fixed and hardened,[19] at all times remaining under the direct control of the King and his council of advisors. Equity was opened to general use by the grace and favor of

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[17]Sir William Holdsworth, Some Makers of English Law (Cambridge: University Press, 1938), 13-14.

[18]Sir Henry Slesser, The Middle Ages in the West (London: Hutchinson and Company, Ltd., 1949), 162-3.

[19]George Burton Adams, Council and Courts in Anglo-Norman England (New Havel: Yale University Press, 1926), 185-202.

the king, but it was not yet made the common right of everybody. It had to be requested for in each case, and evidence furnished to the justices that the use of ordinary justice had been permitted. Usually the petition for equity was granted.

The real development of equity into a great system of law came at a later time, but in its earliest stages its development was underway during Henry's reign, and some of its present-day forms were firmly established. As a suit of Common Law must open with a writ, so must the suit in equity with a petition addressed to both the king and his council, because the council was the organ of the king's prerogative action.[20]

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[20]George Burton Adams, Constitutional History of England (New York: Henry Holt and Company, 1934), 111-3.

CHAPTER VII

CONCLUSION

The formal documents in which Henry's reforms were proclaimed is evidence of no slight activity, but they, nevertheless, give a very imperfect idea of his work as a whole; that was nothing less than the early creation of the judicial organization of the state along the lines it has ever since followed. He did this by going forward with beginnings already made and by opening to general and regular use institutions which had been supplied before only in special cases.[1] The leap forward which was taken in the development of the law and of the judicial system in England during Henry's reign is surprising in ever respect and in some is almost incredible. Yet it seems natural that they were the outgrowth of a gradual series of changes that began with the Norman Conquest and steadily progressed down to the reign of Henry II. From 1164 on, his judicial processes were ever-increasing and growing more and more into a judicial system.[2]

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[1] George Burton Adams, Constitutional History of England (New York: Henry Holt and Company, 1934), 321.

[2] George Burton Adams, Council and Courts in Anglo-Norman England (New Haven: Yale University Press, 1926), 127-8.

Henry II left his work only half done, yet it was very permanent, and its beneficient mark may be seen on the English Law and the English Constitution at the present time. When he ascended the throne of England, he found a people who had long been suffering the miseries of a protracted civil war. When he died, heartbroken at the opposition of his sons, he left England in a state of order and peace that it had never known in the many years before.[3]

Above everything else, Henry II developed the power of the monarchy; power that had been seized by the barons and by the Church, and power that he now restored to the central government under the strict supervision of an almost absolute king. By breaking down the jurisdiction of the barons over the law of the nation, Henry II was better able to enlarge the power of the monarchy, substituting a cheaper, faster and surer means of justice than that given to the plaintiff or defendant in the local manorial or shire courts. He created a specialized and official court system, a national judiciary bringing its royal influence to bear on every part of the land, and a most effective process for introducing local knowledge into the trial of cases.[4] He created a rule of law, a royal law to replace the disorder of local

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[3]David H. Montgomery, The Leading Facts of English History (Boston: Ginn and Company, Publishers, 1897), 97.

[4]Adams, op. cit., 98-9.

law, and a law which commanded respect all over the country. All of his actions contributed to the growth of the monarchial power, while at the same time, they contributed to and helped to build, the English Legal System that exists today.[5]

Moreover, he concentrated the whole system of English justice around a court of judges professionally expert in the law, and he created the principle out of which was to grow the future of all free men: the ideal of trial by jury and the ideal of representation.[6] For not merely did our judicial institutions and processes (writ and jury, the judge and his relation to the trial, the system of courts) stem directly from Henry II's judicial changes, but they were reactions against the strict centralization which they produced that later resulted in the Great Charter and the foundations of free constitutional government.[7] Certainly Henry II was not aware of the changes in government that would come about as a result of his royal activities, and had he been aware of such changes, it is easily apparent that he as a believer in absolute government would have done all that he could have to prevent anything that would cut down the dimensions of royal power.

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[5]George Osborne Sayles, The Medieval Foundations of England (London: Methuen, 1950), 343.

[6]Frederic Maitland and Francis C. Montague, A Sketch of English Legal History (New York: G. P. Putnam's Son, 1915), 36.

[7]Adams, op. cit., 129.

And as has been seen, it was the organization of Henry II's reign which first gave the means for the reduction and systematization of local customs into one uniform Common Law. For, although Henry II raised the Exchequer from the ruin into which all government had fallen in Stephen's time, it was to the judicial development of the English Common Law that he owes much of his fame.[8] Henry and his judges reorganized, strengthened, and consolidated the old procedures of the hundred, manorial and shire courts, combining them with the new and improved methods of procedure and law to create from the disorder of customary law, a Law that would be uniform and one that would be common to the entire realm.[9]

The opinions regarding Henry II's public works must be modified in the face of modern research. In the first place, he was more an administrator than a legislator. Such of his legislation as has reached us belongs in the category of instructions to his officers rather than general enactments. These measures lacked the permanence of statutes; they were supplemented, modified and withdrawn at will. In the second place, his originality has been diminished by the uncovering of evidence that Henry I preceded Henry II with the beginnings of most of his innovations. However, the work of

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[8] Dudley Julius Medley, English Constitutional History (Oxford: B. H. Blackwell, 1913), 101.

[1] Medley, op. cit., 101.

Henry II stands the test of time in that while he did not originate the institutions that he put into practice, he did use old-established but seldom-used institutions to produce the English Legal System.[10]

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[10]Charles Homer Haskins, The Normans in European History (Cambridge: The Riverside Press, 1915), 93-4.

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This is a series of chronicles, supposedly beginning with the Creation and brought down to 1327. Volume II has a wealth of material on the military activity of Henry II and on the controversy between Church and State.

Walter of Coventry. The Historical Collections of Walter of Coventry. 2 Vols. Edited by William Stubbs, London: Longman and Company, 1872. (Rolls Series, No. 58).

Volume I has considerable material on the military career of Henry II. It furnishes some of the highlights of his legal work, including the Assize of Northampton.

II. BOOKS

Adams, George Burton. Constitutional History of England. New York: Henry Holt and Company, 1934.

Adams deals with English history from the Anglo-Saxon period through the early 1930's. He is excellent on common law and legal procedures of Henry II's time, and thereafter.

Adams, George Burton. Council and Courts in Anglo-Norman England. New Haven: Yale University Press, 1926.

Here Adams traces the history of English judicial institutions from the Norman Conquest through the thirteenth century. He gives a good, but opiniated, view of the development of law under Henry II.

Adams, George Burton. The Origin of the English Constitution. New Haven: Yale University Press, 1912.

The author gives a very good account of the development of the central court, and also of the jury system.

Cam, Helen. England before Elizabeth. London: Hutchinson's University Library, 1950.

Miss Cam gives a readable picture of the English political situation in medieval times. The chapter on Henry II and the English Common Law is very informative and excellently written.

Carter, A. T. A History of the English Courts. London: Butterworth and Company, Ltd., 1935.

It is an excellent study of the growth of law under Henry II. The material, gleamed mostly from the original sources, is complete in detail concerning the courts of Henry II.

Coman, Katherine and Kendall, Elizabeth. A Short History of England. New York: The Macmillan Company, 1920.

As the authors state in their preface, it aims to tell in a simple, direct form the story of England, but as such did not add a great deal to this study.

Cross, Arthur. A Short History of England and Greater Britain. New York: The Macmillan Company, 1939.

Various points have been altered and corrected in this third edition of a rather broad English history, which gives only a general account of Henry's reign.

Dietz, Frederick. A Political and Social History of England. New York: The Macmillan Company, 1932.

As the other general histories, it gives only a broad picture of Henry II's reign, and not in any specific way.

Fletcher, C. R. An Introductory History of England. New York: E. P. Dutton and Company, 1907.

It covers English history from the earliest times to the close of the Middle Ages. It was helpful to this study in a few details, but rather briefly.

Green, J. R. A Short History of the English People. New York: Bigelow, Brown and Company, Incorporated, 1892.

Green's book is a history of the English people, passing over the legal innovations of Henry II rather sketchily and briefly.

Harvey, John. The Plantagenets. London: B. T. Batsford, Limited, 1948.

The author furnishes an excellent treatment of the Angevin kings, beginning with Henry II and tracing them down to the last Angevin, Richard III. Chapter I on Henry II gives an interesting perspective to his character, important to an understanding of his legal reforms.

Haskins, Charles Homer. Norman Institutions. Cambridge: University Press, 1925.

Although chiefly concerned with the growth of government and justice in Normandy, Haskins throws a great deal of light on the development of law within England proper.

Haskins, Charles Homer. The Normans in European History. Cambridge: The Riverside Press, 1915.

This is a series of eight lectures emphasizing the Norman influence on European governments, and presents a more critical viewpoint of Henry's work than other historians of this period have done.

Holdsworth, Sir William. Some Makers of English Law. Cambridge: University Press, 1938.

A series of lectures given at Calcutta University in late December, 1937, and January, 1938, the book gives a clear picture of English law both during Henry's reign and thereafter.

Inderwick, F. A. The King's Peace. London: Swan Sonnenschein and Company, 1895.

Inderwick has an excellent treatment of how the English Legal System grew. Though sketchy on my subject, it does give some new and interesting points.

Keeney, Barnaby C. Judgment by Peers. Cambridge: Harvard University Press, 1949.

This writer is mostly concerned with the question of trial by one's peers during the Middle Ages, so far as the barons were concerned. He furnished a great deal of knowledge concerning baronial courts.

Lunt, W. E. History of England. New York: Harper and Brothers, 1945.

Hunt deals extensively with Henry II's legal reforms. Chapter VI is concerned with his reign.

Maitland, Frederic W., and Montague. Francis Charles. A Sketch of English Legal History. New York: G. P. Putnam's Sons, 1915.

It has a good background of his ascension to the throne, but is rather vague and general on his legal reforms.

Marcham, Frederick. A History of England. New York: The Macmillan Company, 1937.

This is rather general concerning the reign of Henry II, and as such only briefly of value to this study.

Medley, Dudley Julius. English Constitutional History. Oxford: B. H. Blackwell, 1913.

It has an excellent appendix on important law cases through the centuries and covers the reign of Henry II in great detail.

Montgomery, David H. The Leading Facts of English History. Boston: Ginn and Company, Publishers, 1897.

Montgomery's book is a general history of England from the earliest times down through the 1880's. Although rather sketchy and general, it did furnish a few additional facts.

Pollard, Albert F. The History of England. New York: Henry Holt and Company, 1912.

Here is a book that covers the history of England up to the early years of the present century, the reforms of Henry II in a very general way.

Pollock, Sir Frederick and Maitland, Frederic William. History of English Law. 2 Vols. Cambridge: University Press, 1898.

In volume I of two volumes, the emphasis is allotted to a general sketch of English legal history. The second volume is more concerned with the various branches of law.

Powicke, F. M. Medieval England 1066-1485. London: Thornton Butterworth, Limited, 1931.

It was not of much help to my subject. It is a general account of medieval institutions, but not specific enough to be of any more value than to back up specific statements.

Ramsey, Sir James H. The Angevin Empire. New York: The Macmillan Company, 1903.

He emphasizes the political picture with the King as the central figure around whom the events of history are grouped. Special attention is given to military history.

Sayles, George Osborne. The Medieval Foundations of England. London: Methuen, 1950.

The author gives an interesting discussion of the English legal scene of Henry II's time.

Seagle, William. The History of Law. New York: Tudor Publishing Company, 1946.

An outstanding historian gives an excellent study of legal history written with the legal picture of Henry II's reign in general, but complete, details.

Slesser, Sir Henry. The Middle Ages in the West. London: Hutchinson and Company, Limited, 1949.

Mr. Slesser gives a good treatment of the institutions and personalities that built the Middle Ages and offers the best treatment concerning Church influence on the English law.

Stubbs, William. Constitutional History of England. 2 Vols. Oxford: Clarendon Press, 1875.

Volume I has a very excellent treatment of Henry II's legal experiments. Written by one of the better medieval historians, it is clear and interesting, full of details.

Stubbs, William. Historical Introduction to the Rolls Series. Compiled and edited by Arthur Hassall. London: Longmans, Green and Company, 1902.

Stubbs has a very good guide to the times of Henry II, Richard I, John, Edward I and Edward II, especially where the Rolls Series may not be available or easily translated.

Stubbs, William. Lectures on Early English History. Edited by Arthur Hassall. London: Longmans, Green and Company, 1906.

Here he gives a fairly good explanation of technical terms described in the Laws and Charters of the Norman Kings. This was helpful in such areas as those concerning common law and juries.

Thorndike, Lynn. The History of Medieval Europe. Cambridge: The Riverside Press, 1949.

It is a general history, and treats only briefly of the legal picture under Henry II.

White, Albert and Notestein, Wallace. Source Problems in English History. New York: Harper and Brothers, Publishers, 1915.

These two authors combine to provide some good material on the origin of Henry II's jury system.

III. PERIODICALS

Cheney, Mary. "Spread of Canon Law in England." English Historical Review. LVI (April, 1941), 177-197.

Miss Cheney treats of the attempts of the Church to spread Canon Law throughout England.

Hurnard, Naomi D. "Assize of Clarendon," English Historical Review. LVI (July, 1941), 374-410.

This gives an excellent treatment of the effect of the Assize of Clarendon as regards the development of the Grand Jury.

Hurnard, Naomi D. "The Anglo-Norman Franchises." English Historical Review. LXIV (July, 1949), 287-327.

This article deals mainly with the reduction of private franchises as part of Henry II's over-all plan to reduce the influence and jurisdiction of private courts.

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Thesis: THE DEVELOPMENT OF THE ENGLISH LAW UNDER HENRY II

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THESIS TITLE: THE DEVELOPMENT OF THE ENGLISH LAW UNDER HENRY II

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The content and form have been checked and approved by the author and thesis adviser. The Graduate School Office assumes no responsibility for errors either in form or content. The copies are sent to the bindery just as they are approved by the author and faculty adviser.

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